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No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HANCOCK TRUCK LINES, INC.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

No opinion was written by the district court. Findings of fact and conclusions of law (R. 65–73) were filed on May 25, 1944. The decision of the Interstate Commerce Commission (R. 40–49) is reported in 42 M. C. C. 547.

JURISDICTION

The final decree of the three-judge district court was entered on May 25, 1944 (R. 74). Petition for appeal was presented and allowed on July 22, 1944 (R. 74–75, 78). The jurisdiction

of this Court is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345). After considering the jurisdictional statements, on November 6, 1944, the Court entered an order postponing further consideration of the question of its jurisdiction until the hearing of the case on the merits (R. 150).

QUESTIONS PRESENTED

1. Whether the appeal was properly taken, since it was allowed by a single judge rather than by the three members of the statutory district court and since it was taken within 60 days (28 U. S. C. 47a) rather than 30 days (28 U. S. C. 47) after entry of the decree.

2. Whether the Commission, under the "grandfather" clause of Section 206 (a) of Part II of the Interstate Commerce Act, was empowered to limit appellee's operating authority as a common carrier by motor vehicle to transportation of traffic assembled by freight forwarders.

3. Whether the district court improperly exercised the Commission's administrative functions.

STATUTES INVOLVED

The statutes involved are Sections 210 and 238 of the Judicial Code, as amended, and Sections

203 (a) (14), 206 (a), and 208 (a) of Part II of the Interstate Commerce Act, as amended. The pertinent provisions are set forth in the Appendix, *infra*, pp. 49–57.

STATEMENT

Under 28 U. S. C. 41 (28), 43–48, appellee, Hancock Truck Lines, Inc., filed a complaint (R. 1–11) seeking to set aside the Interstate Commerce Commission's order of August 4, 1943 (R. 49–50) in a proceeding wherein appellee's predecessor, the Globe Cartage Company (hereinafter referred to as Globe), sought operating authority as a carrier of general commodities by motor vehicle under the "grandfather" clause of Sections 206 (a) (Appendix, *infra*, pp. 55–56) and 209 (a) of Part II of the Interstate Commerce Act. With the Commission's approval, appellee became successor in interest to Globe and acquired whatever operating rights Globe might ultimately obtain in the "grandfather" clause proceeding (R. 69; 99–105; 38 M. C. C. 382).

Globe's application under Sections 206 (a) and 209 (a) of the Act was the subject of a report by Division 5 of the Commission, dated October 7, 1942 (R. 12–39; 41 M. C. C. 313). Division 5 found that Globe had been engaged solely in the transportation of freight for the Universal Carloading and Distributing Company, a freight forwarder, as was demonstrated by the fact that of sev-

eral thousand trips shown of record, not one related to service other than that performed for Universal (R. 13). Division 5 concluded that Globe had been a common carrier, rather than a contract carrier (R. 14–15), and that to restrict its operation to carriage for freight forwarders would be inconsistent with its common carrier status (R. 21–22). Commissioner Rogers, in a separate opinion, expressed the view that Globe's operating authority should be restricted to the type of operations which it had performed in the past, and suggested that this might be achieved by restricting its operations to traffic moving on the bills of lading of freight forwarders (R. 22). Commissioner Patterson dissented on the ground that Globe, in his judgment, had been a contract carrier rather than a common carrier (R. 23).

Numerous petitions for reconsideration were filed by various parties to the proceeding, and reconsideration was granted (R. 41–42), following which the Commission on August 4, 1943, issued the report (R. 40–49; 42 M. C. C. 547) and order (R. 49–50) attacked in the present suit. The full Commission, like Division 5, concluded that Globe during the "grandfather" period had been a common carrier rather than a contract carrier (R. 43). But it held that in order to allow Globe to continue all *bona fide* operations which it had performed in the past, while at the same time keeping it from enlarging its business beyond

the scope of its prior operations, the operating authority granted should be limited to carriage of general commodities "which are at the time moving on bills of lading of freight forwarders, between the points and in the manner described in the findings in the prior report". The full Commission found that such a limitation was not at all inconsistent with Globe's common carrier status. (R. 44–45.) Commissioner Patterson again dissented, on the ground that Globe was a contract carrier and was not entitled to operating authority as a common carrier (R. 46–49). Globe's successor, Hancock Truck Lines, filed a petition for reconsideration (R. 127–144) which was denied (Tr. 420).[1]

On March 29, 1944, appellee filed suit in the United States District Court for the Southern District of Indiana, to set aside the Commission's order (R. 1–11). The United States and the Commission filed answers (R. 53–59), and the cause came on for hearing on April 8, 1944, and April 28, 1944 (R. 65, 88). The Regular Common Carrier Conference of the American Trucking Association, Inc.[2] which had intervened before

[1] The order denying the petition for reconsideration was part of Hancock's Exhibit G (see R. 94). Under the stipulation regarding the printing of the record (R. 148–149), the parties herein are permitted to refer to any portion of Exhibit G (Tr. 356–420). The transcript of record is on file with the clerk of this Court.

[2] This party is the appellant in No. 449, this Term.

the Commission (R. 41) was permitted to intervene in the court below (R. 60–61). Without opinion, the district court on May 25, 1944, entered its findings of fact, conclusions of law, and decree setting aside that part of the Commission's order which confined plaintiff's operating authority to commodities moving on bills of lading of freight forwarders (R. 65–73). Petition for appeal was presented and allowed on July 22, 1944 (R. 74–75, 78).

After appellants filed their jurisdictional statements in this Court, appellee filed documents urging that the appeal was not timely taken and was improperly taken, because allowed by one judge rather than three judges. On November 6, 1944, the Court entered an order stating that it was postponing further consideration of the jurisdictional question to the hearing on the merits (R. 150).

SUMMARY OF ARGUMENT

I

The appeal herein was taken in the proper manner and in due time. The Urgent Deficiencies Act of October 22, 1913 (38 Stat. 220; 28 U. S. C. 47), requires action by a court of three judges only for the hearing and determination of suits to set aside orders of the Interstate Commerce Commission, and does not require that appeals in such cases be allowed by the three judges, or a majority of them. The absence of such a requirement in the statute is not inadvertent. The granting of an appeal, when, as here, it is a matter of

right, is simply a ministerial act. *Tagg Bros. v. United States*, 280 U. S. 420, 433, indicates that a single judge may allow an appeal. Moreover, in numerous instances this Court has decided on their merits cases where the appeal was allowed by one judge. Any doubt as to the point is removed by Section 3 of the Act of April 6, 1942 (56 Stat. 198–199, 28 U. S. C. Supp. III 792), which authorizes a single judge to enter all orders required or permitted by the Rules of Civil Procedure. Rule 72 of such rules provides that an appeal may be allowed as prescribed by the Rules of this Court; and Rule 36 of the Rules of this Court authorizes allowance of an appeal by a single judge.

An appeal from a final decree may be taken within 60 days after entry thereof. This is specifically prescribed by a provision of the Urgent Deficiencies Act now found in 28 U. S. C. 47a. That provision, being one which "relate[s] to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money" was reaffirmed (and not repealed, as appellee contends) by the Act of February 13, 1925 (43 Stat. 936; 28 U. S. C. 345), amending Section 238 of the Judicial Code. The legislative history of the Urgent Deficiencies Act shows that the provision found in 28 U. S. C. 47a was enacted as a part of the trial and appellate procedure made necessary by the decision of Congress to adopt a new

type of three-judge court as the reviewing agency for orders of the Interstate Commerce Commission in place of the Commerce Court abolished by that statute. Therefore that provision is applicable to suits to set aside the Commission's orders, and "relate[s] to the review of * * * final judgments and decrees" in such suits; it is not, as appellee argues, a provision applicable only to other types of suits formerly cognizable in the Commerce Court and transferred by the Urgent Deficiencies Act to district courts, to which the requirement of three judges does not apply. Hence the provision was not repealed by the Act of 1925, and governs the time for appeal in the present case. The legislative history of the Act of 1925 indicates that Congress did not intend to repeal 28 U. S. C. 47a.

II

The Interstate Commerce Commission, having made a finding that the only type of traffic transported by appellee's predecessor in interest during the "grandfather" period consisted of commodities "moving on bills of lading of freight f... warders," may lawfully grant to appellee operating authority, as a common carrier by motor vehicle, confined to transportation of such commodities. Appellee now challenges this restriction, but we believe it has no standing to do so. Its petition to the Commission for reconsideration expressly waived objection to this restriction, and

since it failed to exhaust its administrative remedies, the district court should not have passed upon the validity of the restriction. However, the restriction was justified and was within the Commission's statutory power.

The finding that appellee's predecessor in interest transported only commodities moving on bills of lading of freight forwarders cannot be challenged by appellee, since the record before the Commission was not put in evidence. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286. That finding being accepted, it would not be in harmony with the "grandfather" clause as construed by this Court for the Commission to have granted appellee any operating authority more extensive in scope or character. Nothing but "substantial parity" with prior *bona fide* operations is contemplated by the statute. Enlargement or expansion of the business is not permitted. *McDonald* v. *Thompson,* 305 U. S. 263, 266; *United States* v. *Maher,* 307 U. S. 148, 155; *Alton R. Co.* v. *United States,* 315 U. S. 15, 22; *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 481; *Gregg Cartage Co.* v. *United States,* 316 U. S. 74, 83; *Noble* v. *United States,* 319 U. S. 88, 92; *Crescent Express Lines* v. *United States,* 320 U. S. 401, 408–409.

The Commission in thus restricting appellee's right was merely performing its duty under Section 208 (a) to "specify the service to be rendered". This Court has sustained numerous

restrictions entered under this and comparable language in Section 209 (b) relating to contract carriers, by virtue of which the Commission sought to confine carriers to the exact type of service performed by them during the "grandfather" period. *E. g., United States* v. *Carolina Carriers Corp.*, 315 U. S. 475; *Noble* v. *United States*, 319 U. S. 88; *Crescent Express Lines* v. *United States*, 320 U. S. 401. Furthermore, in many cases involving motor carrier service auxiliary or supplemental to rail service, provisions have been upheld confining the motor carrier transportation authorized to transportation of commodities moving on railroad bills of lading. The propriety of the type of operating authority granted to appellee is thus clearly demonstrated.

Since the Commission was not exercising its power under Section 208 (a) to attach to a "'grandfather" clause certificate "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require", the district court erred in concluding that this restriction could not be sustained in the absence of a finding by the Commission that it was required by the public convenience and necessity. Cf. *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1.

The district court also erred in concluding that such restriction was inconsistent with appellee's common carrier status. The Commission's contrary conclusion was based on the fact that ap-

pellee's predecessor held out to transport for the general public, because it transported for a freight forwarder, which in turn dealt with the public in general and did not limit its activities to particular shippers. Inasmuch as the Commission's determination is based on a correct rule of law, and is supported by a rational basis and substantial evidence, it is binding upon this Court. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145–146; *Gray v. Powell,* 314 U. S. 402, 411–412; *Securities Commission* v. *Chenery Corp.,* 318 U. S. 80, 99; *Thomson* v. *United States,* 321 U. S. 19, 23; *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634, 637–638.

III

Even if it should be held that appellee was not entitled to common carrier status, or that a common carrier may not lawfully be granted operating authority confined to commodities moving on bills of lading of freight forwarders, the district court erred in setting aside the portion of the Commission's order containing the limitation to such commodities, while leaving the rest of the order in force. The court thereby undertook to grant appellee operating authority different from that granted by the Commission, and in so doing undertook to exercise an administrative function conferred on the Commission by Congress. The Commission's order was indivisible, and courts may not substitute a different plan for trans-

portation operations. *Chesapeake & Ohio Ry. Co.* v. *United States,* 35 F. (2d) 769, 774 (S. D. W. Va.), affirmed, 283 U. S. 35. If the Commission's order was based upon an improper application of legal standards, the case should have been remanded to the Commission for appropriate action by that body in the light of applicable law. *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 618–619, 622. To determine the scope and character of the operating authority as a motor carrier which should be granted to appellee is not a judicial, but an administrative function, entailing not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission. *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 484, 489–490.

ARGUMENT

I

THE APPEAL WAS TAKEN IN THE PROPER MANNER AND IN DUE TIME

The appeal herein was allowed by Judge Baltzell, one of the members of the three-judge court, on July 22, 1944, more than 30 days but within 60 days after the district court's decree of May 25, 1944. Appellee argues that an appeal in cases of this sort may not be allowed by a single judge,

but must be allowed by a majority of the three-judge court hearing and determining the case; and appellee also argues that the appeal must be taken within 30 days after the date of the decree. We believe that these contentions are unsound.

A. ALLOWANCE OF APPEAL BY A SINGLE JUDGE IS PROPER

Although the Act of October 22, 1913 (38 Stat. 220, 28 U. S. C. 47), prescribes in considerable detail both the trial and appellate procedure to be followed in suits to set aside orders of the Commission, there is no language to be found indicating that the action of three judges, or a majority of them, is necessary in order that an appeal may be validly allowed. The silence of the statute is significant. The requirement that an application for an interlocutory injunction "shall be heard and determined by three judges," and that "upon the final hearing * * * the same requirement as to judges * * * shall apply" (38 Stat. 220, 28 U. S. C. 47) distinguishes those stages of the litigation from that which follows rendition of a final judgment or decree and negates the possibility that such procedure should be regarded as applicable except where expressly prescribed.

The failure of Congress to provide specifically for the assembly of three judges to allow an appeal was not inadvertent. The granting of an

appeal, when, as here, it is a matter of right, is purely a ministerial act. It is not, in fact, the actual granting of the appeal which results in the taking of an appeal, but only the filing of a petition for appeal and thus it has been held that an appeal is timely if the petition is timely filed, even though the appeal is not granted within the prescribed time. *United States* v. *Vigil,* 10 Wall. 423, 427; *Latham* v. *United States,* 131 U. S. Appendix, XCVII; cf. *Matton Co.* v. *Murphy,* 319 U. S. 412, 414. The granting of an appeal is unlike the hearing and determining of the case either at the interlocutory or the final stage, where the questions involved were deemed by Congress to be sufficiently important from the standpoint of the public interest to make it undesirable to entrust the decision of such issues to a single judge.

Again, it has been the consistent and usual practice in taking appeals to this Court in this type of case to have the appeal allowed by a single judge. In *Tagg Bros.* v. *United States,* 280 U. S. 420, 433 the opinion recites that "The District Judge allowed an appeal to this Court." A footnote on the same page states:

> In doing so, he also approved an appeal bond to operate as a supersedeas and granted a temporary injunction pending the appeal. This part of the order, being beyond the power of a single judge, was later vacated by him. * * *

This indicates that this Court thought that the single judge's action, insofar as it involved the granting of the appeal, was perfectly proper. Furthermore, examination of the printed records in some of the Commission's cases which have come before this Court in the present and past two Terms reveals that the appeals in the following cases were allowed by but one judge: *Interstate Commerce Commission* v. *Inland Waterways,* 319 U. S. 671; *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U. S. 368; *City of Yonkers* v. *United States,* 320 U. S. 685; *Thomson* v. *United States,* 321 U. S. 19; *McLean Trucking Co.* v. *United States,* 321 U. S. 67; *United States* v. *Wabash R. Co.,* 321 U. S. 403; *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634; *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 322 U. S. 1; *United States* v. *Marshall Transport Co.,* 322 U. S. 31; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503; *United States* v. *Pennsylvania R. R. Co.,* Nos. 47–48 this Term, decided January 29, 1945; *Pennsylvania R. R. Co.* v. *United States,* No. 182 this Term, decided January 29, 1945. This practice would seem authorized under Rule 36 of the rules of this Court, providing that, "In cases where an appeal may be had from a district court to this court the same may be allowed, in term time or in vacation, by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court."

Finally, any doubt that may have existed on this score was effectually removed by Section 3 of the Act of April 6, 1942 (56 Stat. 198–199, 28 U. S. C. Supp. III 792).[3] This Section provides that in a case of this type a single judge may "enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory

[3] Section 3 provides:

"In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing by reason of the provisions of section 266 of the Judicial Code, the Act of October 22, 1913, chapter 32, or the Act of August 24, 1937, chapter 754, section 3 (being, respectively, secs. 380, 47, and 380a of title 28, U. S. C.), or the Act of February 11, 1903 (32 Stat. 823; U. S. C., 1940 edition, title 15, sec. 28 and title 49, sec. 44), as amended by section 1 of this Act, any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action: *Provided, however*, That any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court on its own motion."

injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action * * *."[4] Under the Rules of Civil Procedure a single judge is permitted to grant an appeal to this Court. Thus, Rule 72 provides that an appeal from a district court to the Supreme Court shall be allowed "as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal," and, as above indicated, Rule 36 of the rules of this Court authorizes the granting of an appeal to this Court from a district court by a single judge.

B. APPEAL MAY BE TAKEN IN SIXTY DAYS FROM FINAL DECREE

That an appeal may be taken within 60 days after the entry of final judgment or decree in a case brought to set aside an order of the Interstate Commerce Commission is likewise clear. The Urgent Deficiencies Act of October 22, 1913, expressly so provides (38 Stat. 220, 28 U. S. C. 47a).

[4] The proviso that the single judge's action is subject to review "at any time prior to final hearing" by the court as constituted for final hearing (fn. 3, *supra*, p. 16) merely shows that after final hearing his action is not reviewable by his colleagues; it does not, as appellee argues, indicate that the powers conferred on the single judge by the statute are limited to those exercisable prior to final hearing. The quoted words are a limitation, not upon the authority of the single judge, but upon that of the three judges as a reviewing body. The proviso is an indication, rather, that after final hearing there is no occasion for action by three judges, and hence confirms the conclusion that an appeal may be allowed by a single judge.

That statute, after abolishing the Commerce Court and transferring its jurisdiction to the several district courts, specified that "The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court" and that "the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court" (38 Stat. 220). It was further provided that no interlocutory injunction setting aside any order of the Interstate Commerce Commission should be granted, except after a hearing before a court of three judges, one of whom must be a circuit judge, such hearing to be given precedence and expedited in every way. With respect to final hearing and appeals, the Act reads as follows (*ibid.*):

> An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment

> or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. * * *[5]

The first sentence above quoted from the Urgent Deficiencies Act appears in the United States Code as part of Title 28, Section 47, while the last sentence, apparently omitted through inadvertence of the compilers when the Code was originally published, was added, with the compilers' addition of the phrase "in the cases specified in section 44 of this title [28]",[6] in the 1934

[5] The sentence immediately following the quoted language is "And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State" (38 Stat. 220–221). A similar sentence appears in 28 U. S. C. 47a (Appendix, *infra*, pp. 53–54). Accordingly, in cases of this sort, the appellant is required to serve the Attorney General of the State in which the district court is located. The Government and the Commission, the appellants, followed this practice (R. 78–79). Cf. fn. 15, *infra*, p. 30.

[6] Section 47a of Title 28 provides:

"A final judgment or decree of the district court *in the cases specified in section 44 of this title* [28] may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. * * *" [Italics supplied.]

Section 44 of Title 28 in turn provides in part:

"The procedure in the district courts * * * in respect

edition and retained thereafter as part of Section 47a of Title 28.

The two sentences are consecutive in the statute as enacted, and are obviously to be read and construed together. In prescribing in the second sentence a specific period of 60 days for taking an appeal from final decrees, Congress undoubtedly must have meant the language used to be applicable to final decrees in the type of case about which it had been speaking in the preceding sentence, that is, in suits to set aside orders of the Interstate Commerce Commission. If this is true, the second sentence quoted above was reaffirmed (and not repealed, as appellee contends) by the Act of February 13, 1925 (43 Stat. 936). Section 1 of that Act amended Section 238 of the Judicial Code to read in part as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * * * *

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to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 47, 47a and 48 of this title."

Read together, the two Sections provide for sixty days within which to appeal to the Supreme Court from a final judgment or decree of a district court in cases where, as here, a party has sought judicial review of an order of the Interstate Commerce Commission.

(4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money. (42 Stat. 938)[7]

Only if appellee succeeds in demonstrating that the second sentence quoted above (pp. 18–19) from the Urgent Deficiencies Act (38 Stat. 220) is not a portion which "relates to the review of interlocutory and final judgments and decrees in suits to * * * suspend, or set aside orders of the Interstate Commerce Commission" can the contention that it was repealed by the Act of February 13, 1925, be advanced with any degree of plausibility.

Appellee's contention is that the second sentence (the basis for the language now substantially found in 28 U. S. C. 47a) does not relate to appeals in suits to set aside orders of the Commission, but relates only to appeals in other types of cases which were formerly within the jurisdic-

[7] Section 13 of the Act of February 13, 1925, provided in part:

"That the following statutes and parts of statutes be, and they are, repealed:

* * * * * * *

"All other Acts and parts of Acts in so far as they are embraced within and superseded by this Act or are inconsistent therewith" (43 Stat. 941, 942).

tion of the Commerce Court and were transferred to the district courts by the Urgent Deficiencies Act. In other words, appellee contends that this sentence found in the Urgent Deficiencies Act does not apply to appeals in the type of cases which must be heard before a district court composed of three judges, but refers solely to matters which, having been brought within the jurisdiction of the district court by the Urgent Deficiencies Act, may be disposed of in that court with a single judge sitting. But nothing in the language of the Urgent Deficiencies Act, or in its legislative history, or in judicial decisions thereunder, supports appellee's interpretation.

If the second sentence quoted from the Urgent Deficiencies Act must be interpreted as applicable to one particular type of cases transferred from the Commerce Court, and not to all such cases, it would seem that suits in a three-judge court to set aside the Commission's orders are precisely the type of case to which the sentence does apply.[8] This is so because it was the necessity of providing for trial and appellate procedure in such suits that

[8] But even if the second sentence be interpreted as applying only to cases within the Commerce Court's jurisdiction other than those brought to set aside an order of the Commission, it would not be repealed by the Act of February 13, 1925. Under that interpretation it would apply, *inter alia*, to suits "for the enforcement * * * of any order of the Interstate Commerce Commission other than for the pay- to suits "to enforce * * * orders of the.. from repeal. In *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 482, it was said that notwithstanding

furnished the occasion for enactment of the entire paragraph of the Urgent Deficiencies Act containing that sentence.

The Mann-Elkins Act of July 18, 1910 (36 Stat. 539), which established the Commerce Court, conferred upon it jurisdiction over four kinds of cases:[9] (1) suits to enforce certain orders of the

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the amendments to Section 238 of the Judicial Code made by the Act of February 13, 1925, this Court has jurisdiction on appeal of "any cause formerly cognizable by the Commerce Court" brought to enforce or set aside an order of the Interstate Commerce Commission.

[9] In Section 1 of the Mann-Elkins Act, it was provided:

"* * * That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

"Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States" (36 Stat. 539).

Interstate Commerce Commission (see 28 U. S. C. 41 (27)); (2) suits to enjoin, set aside, annul, or suspend orders of the Commission (see 28 U. S. C. 41 (28)); (3) certain suits under Section 3 of the Interstate Commerce Act (as amended by the Act of February 19, 1903, 32 Stat. 848, 49 U. S. C. 43) to prevent unjust discriminations; (4) certain mandamus proceedings under Section 20 (as amended by the Act of June 29, 1906, 34 Stat. 590-5, 49 U. S. C. 20 (9)), and Section 23 (as added by the Act of March 2, 1889, 25 Stat. 862, 49 U. S. C. 49) of the Interstate Commerce Act.

Section 2[10] of the Mann-Elkins Act (36 Stat. 539, 542) provided for review by this Court of

[10] This Section became Section 210 of the Judicial Code (36 Stat. 1150), reading as follows:

"SEC. 210. A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the commerce court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunc-

decisions of the Commerce Court. Such appeals were to be taken within 60 days from final judgment or decree, and within 30 days from an interlocutory order or decree granting or continuing an injunction restraining the enforcement of an order of the Commission. These periods were the same as had prevailed under Section 5 of the Hepburn Act (34 Stat. 584, 592; see also 32 Stat. 823) dealing with reviews of orders of the Commission by three-judge circuit courts. Until the Hepburn Act was enacted in 1906, the Commission's orders were not reviewable by those subject thereto, since its orders were only enforceable by judicial action. See 1 Sharfman, *The Interstate Commerce Commission* (1931), 22–24, 27.

When the Urgent Deficiencies Act transferred to the district courts the jurisdiction theretofore exercised by the Commerce Court, it provided that "the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court" (38 Stat. 220). This language, together with the provisions of Section 2 of the Mann-Elkins Act (Section 210 of the

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tion restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court."

Judicial Code, fn. 10, *supra*, p. 24) would have been sufficient to deal with appeals in all cases embraced within the transferred jurisdiction other than suits requiring a hearing before three judges (see *supra*, p. 24). Consequently, nothing in the subsequent language of the paragraph of the Urgent Deficiencies Act which forms the basis of 28 U. S. C. 47 and 28 U. S. C. 47a was enacted for the purpose of dealing with appeals from cases to be heard henceforth by a single judge. All the provisions of that paragraph, including Section 47a, were made necessary by the fact that for the second item of transferred jurisdiction (suits to set aside the Commission's orders) Congress decided to establish a type of procedure requiring hearing by a district court composed ordinarily of a circuit court of appeals judge and two district judges.

When the Commerce Court, a tribunal of five judges, ceased to be the agency for review of orders of the Commission, Congress was of the opinion that such review was a function too important to be entrusted to a single judge. See Dobie, *Handbook of Federal Jurisdiction and Procedure* (1928), p. 11. The three-judge court was a tribunal already employed in certain suits under the Interstate Commerce Act (see 32 Stat. 823; 34 Stat. 584, 592) and in certain suits under Section 17 of the Mann-Elkins Act.[11] It was there-

[11] Section 17 of the Mann-Elkins Act (36 Stat. 557) provided for an expedited hearing by a certain type of three-judge court on applications for an interlocutory injunction

fore natural for Congress in 1913 to adopt this as a suitable method of providing for judicial review of the Commission's orders by a three-judge court, whose composition, however, was of a new type.

The legislative history of the Urgent Deficiencies Act shows that the entire passage (38 Stat. 220) quoted above (pp. 18–19) was the logical outgrowth of the adoption of the new type of three-judge court as the reviewing tribunal for orders of the Commission. When this new mode of handling the Commission's cases was adopted, it became necessary for Congress to regulate the functioning of such specially constituted district courts and to provide for appeals from their decisions. The provisions theretofore in force relating to procedure in and appeals from the Commerce Court of course did not cover the subject of procedure in and appeals from this type of three-judge court,

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suspending or restraining the enforcement of a state statute. This provision was carried forward as Section 266 of the Judicial Code of March 3, 1911 (36 Stat. 1162), and was subsequently amended by the Act of March 4, 1913 (37 Stat. 1013). The Act of February 13, 1925 (43 Stat. 938) provided that in cases under Section 266 "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." Another type of three-judge expediting court for equity suits brought by the United States under the Sherman Antitrust Act and the Interstate Commerce Act had previously been created under the Act of February 11, 1903 (32 Stat. 823), amended by the Act of June 25, 1910 (36 Stat. 854).

which type was not established for purposes of reviewing orders of the Commission until the enactment of the Urgent Deficiencies Act itself. Consequently, Congress prescribed specific rules in that regard, including the two sentences heretofore quoted (pp. 18–19). The first sentence provided for direct appeals to the Supreme Court from interlocutory decisions, specified 30 days as the time limit for taking such appeals, and also prescribed that on final hearing the same requirement as to judges and the same procedure as to expedition and appeal should apply. This language as to appeal after final hearing is obviously to be interpreted as meaning that appeal in such cases shall be direct to the Supreme Court. Such direct appeal is the usual rule in all three-judge matters, and the context reveals that such an appeal was meant in this part of the statutory language. However, the time for taking the appeal after final hearing is governed by the second sentence, which specifies 60 days.

By prescribing time limits of 30 and 60 days, respectively, for appeals from interlocutory and final decisions in three-judge cases involving review of the Commission's orders, Congress brought the appellate procedure of this newly established type of three-judge court into uniformity with the rules as to time for appeal which had governed appeals from the Commerce Court in the same type of cases. Appellee's contention, without warrant in the legislative history of the Urgent Deficiencies

Act, attributes to Congress an intention to change the period of time for appeals from final decisions in cases involving the Commission's orders, and thus to destroy such uniformity.

The paragraph relating to three-judge courts which appears in the Urgent Deficiencies Act originated in substantially its present form in the bill as submitted by Mr. Fitzgerald, Chairman of the House Committee on Appropriations.[12] As then worded, three-judge procedure would have been required for any "preliminary injunction, or restraining or stay order," and a direct appeal would have been permitted from the order "granting" such relief. In the Senate, the requirement of three judges was limited to "interlocutory" injunctions, and a single judge was empowered to issue temporary restraining orders under certain conditions.[13] An appeal was also provided from the denial, as well as granting, of an interlocutory injunction. The intent of the Senate Appropriations Committee was to apply the procedure of Section 266 of the Judicial Code (see fn. 11, *supra*, p. 26) to cases involving orders of the Interstate Commerce Commission, adding certain stay provisions derived from Section 3 of the Mann-Elkins

[12] H. Rep. No. 64, 63rd Cong., 1st Sess.; 50 Cong. Rec. 4527, 4622.

[13] See S. Rep. No. 116, 63rd Cong., 1st Sess. and accompanying print of the bill dated October 2, 1913. The Senate's amendments are designated by number in the print of October 7, 1913, for use of the House.

Act (36 Stat. 542–543).[14] The sentence regarding appeals from final decisions was changed by substituting the words "in equity cases" in place of the words "from the Commerce Court to the Supreme Court", following the provision that "such appeals may be taken in like manner as appeals are taken under existing law * * *." See *supra*, pp. 18–19. At the suggestion of Senator Walsh of Montana, a sentence relating to injunctions against state administrative agencies was omitted as being inappropriate in a bill dealing with orders of the Interstate Commerce Commission.[15] The foregoing amendments, as well as others not pertinent here, were accepted in the Conference Report.[16]

Examination of the legislative history of the Act of February 13, 1925 (*supra*, pp. 20–21), which appellee asserts repealed 28 U. S. C. 47a, indicates that Congress did not intend to change the existing law concerning the time for taking such appeals as that involved herein. At the Hearings on H. R.

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[14] 50 Cong. Rec. 5407–8. These changes were embraced in Senate Amendment No. 64. Cf. 50 Cong. Rec. 5425, 5594.

[15] 50 Cong. Rec. 5408. These changes were embraced in Senate Amendment No. 65. It would seem that the following sentence, also relating to suits against state agencies, should likewise have been omitted from the bill, and it was deleted by the amendment voted (50 Cong. Rec. 5409), but it was permitted to remain in the law as enacted: "And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State" (38 Stat. 220–221). See fn. 5, *supra*, p. 19.

[16] Conference Rep. No. 91, 63rd Cong., 1st sess.; 50 Cong. Rec. 5551, 5612.

8206, which was a basis for the Act of 1925, Mr. Justice Van Devanter stated:

> The nature of the cases within these classes and the fact that the hearing is required to be before three judges are believed to make it appropriate that the existing right to review in the Supreme Court in such cases should be preserved. (Hearings, H. Committee on the Judiciary, H. R. 8206, 68th Cong., 1st sess., p. 15)

See also Mr. Justice McReynolds' substantially similar statement (*ibid.*, p. 22).

The report of Senator Cummins, Chairman of the Senate Committee on the Judiciary, on S. 2060,[17] which became the Act of February 13, 1925, contains the following statement:

> As is well known, there are certain cases which, under the present law, may be taken directly from the district court to the Supreme Court. Without entering into a description of these four classes of cases, it is sufficient to say that under the existing law these are cases which must be heard by three judges, one of whom is a circuit judge. The bill does not change the jurisdiction of the Supreme Court in such cases.

There was little debate, but Senator Cummins did state that an amendment (contained in the Act of 1925) dealing with the Packers and Stock-

[17] S. 2060, which was substituted for H. R. 8206, was substantially the same as the House bill (Hearings, H. Committee on the Judiciary, H. R. 8206, 68th Cong., 1st sess., p. 16; 66 Cong. Rec. 2925).

yards Act of 1921 (7 U. S. C. 191–231) did not limit in any respect the right of review of either interlocutory or final judgments of district courts in the other classes of cases directly reviewable (66 Cong. Rec. 2917).

Thus nothing in the language or the legislative history of the Urgent Deficiencies Act or of the Act of February 13, 1925, supports appellee's contentions. Moreover, the decisions of this Court and its uniform practice demonstrate that appellee's position is untenable.

In *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14, 23, this Court in 1933 referred to 28 U. S. C. 47a as being included among the statutory provisions which then remained in force. Furthermore, if appellee's contentions are correct, a very large proportion of appeals in suits to set aside orders of the Commission have been improperly granted, and this Court has decided many cases over which it had no jurisdiction. A review of the printed records and briefs in this Court in the present and past two Terms alone in cases involving the Commission indicates that in the following instances the appeals were taken more than 30 days, but within 60 days, after the final decree: *L. T. Barringer & Co.* v. *United States*, 319 U. S. 1; *Interstate Commerce Commission* v. *Columbus & Greenville Ry. Co.*, 319 U. S. 551; *Interstate Commerce Commission* v. *Inland Waterways*

Corp., 319 U. S. 671; *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368; *Crescent Express Lines* v. *United States*, 320 U. S. 401; *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U. S. 194; *United States* v. *Wabash R. Co.*, 321 U. S. 403; *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1; *United States* v. *Marshall Transport Co.*, 322 U. S. 31; *United States* v. *Pennsylvania R. R. Co.*, Nos. 47–48 this Term, decided January 29, 1945; *Pennsylvania R. R. Co.* v. *United States*, No. 182 this Term, decided January 29, 1945. And in the *Columbus & Greenville Ry.* case, the appellee made the same contention as is made in the case at bar in support of a motion to dismiss the Commission's appeal or affirm. While no specific action was taken on the motion, the Court proceeded to decide the case on the merits and thus impliedly rejected the contention.

Appellee, referring to the statement made by this Court in *Virginian Ry.* v. *United States*, 272 U. S. 658, 672, that the Urgent Deficiencies Act had shortened the appeal time,[18] asserts that the

[18] The Court in the passage referred to was comparing Section 266 of the Judicial Code and the provisions of the Urgent Deficiencies Act, with particular reference to the power of the district court to grant a stay pending appeal, and said:

"The character of the proceeding and the end sought are the same in the two statutes. The two provisions origi-

Court meant that the Urgent Deficiencies Act had reduced the appeal time from 60 days to 30 days. It appears, however, that the Court meant only that the Urgent Deficiencies Act had established a shorter period for taking an appeal to this Court than the three-month period which is the general appeal time (see 28 U. S. C. 350).

In view of the foregoing discussion, it is submitted that the specific terms of 28 U. S. C. 47a govern the period of taking an appeal, and that the present appeal was taken in due time and in the proper manner, thereby establishing this Court's jurisdiction.

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nated in the same Act. Section 266 is a codification of § 17 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 557. The provision of the Act of 1913, here in question, is an adaptation to the district courts of § 3 of the Act of 1910, which prescribed the procedure for such applications before the Commerce Court. No reason is suggested why the rule governing in cases of appeals from the district court under § 266 should not apply also to appeals from those courts under the Act of 1913. Moreover, the latter Act, in referring in the same connection to appeals from final decrees, declares that "such appeals may be taken in like manner as appeals are taken under existing law in equity cases." Congress evidently deemed that it had adequately guarded against the dangers incident to the improvident issue of the writs of injunction in cases of this character by the provisions which require action by the court of three judges, which permit of expediting the hearings before the district court, which shorten the period of appeal, and which give a direct appeal to this Court." [272 U. S. at 672.]

II

THE COMMISSION MAY GRANT OPERATING AUTHORITY CONFINING APPELLEE TO TRANSPORTATION OF COMMODITIES "MOVING ON BILLS OF LADING OF FREIGHT FORWARDERS"

The principal question for determination is whether the Commission may lawfully grant to appellee operating authority confined to transportation of commodities "moving on bills of lading of freight forwarders," that being the only type of traffic transported by appellee's predecessor in interest during the "grandfather" period. It is believed that appellee has no standing to raise this question, for in its petition to the Commission for reconsideration (R. 127–144), appellee complained of the Commission's report and order (R. 40–50) only with respect to the limitation of the territorial scope of its operations. Appellee expressly waived (R. 129, see also R. 144) objection to the restriction limiting it to the carriage of traffic moving on bills of lading of freight forwarders. Since appellee failed to exhaust its administrative remedies,[10] the district court should

[10] See *Yakus* v. *United States*, 321 U. S. 414, 434; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 310, 311; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468, 471; *Board of Railroad Commissioners* v. *Great Northern Ry.*, 281 U. S. 412, 424; *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285–291; *United States* v. *Sing Tuck*, 194 U. S. 161, 168; *Carolina Scenic Coach Lines* v. *United States*, 56 F. Supp. 801, 804–805 (W. D. N. C.), affirmed *per curiam*, December 11, 1944, No. 637, present Term; *Board of Public Utility*

not have passed upon the validity of the restriction prescribed by the Commission.[20] In any event, we maintain that the Commission may properly grant such authority, and indeed that under applicable law and the facts of the case it would not have been permissible for the Commission to grant appellee the more extensive authority which the district court undertook to confer.

The Commission's finding that during the "grandfather" period appellee's predecessor in interest transported no commodities other than those moving on bills of lading of freight forwarders cannot be challenged by appellee. Having chosen not to offer in evidence in this case the record made in the proceedings before the Commission, appellee may not question the facts as found by the Commission. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286. Nor may appellee collaterally attack the full Commission's findings here by referring to Division 4's report in the proceeding involving appellee's acquisition of Globe, where it was said, as of May 16, 1942, that only "approximately

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Com'rs. v. *United States*, 21 F. Supp. 543, 549 (D. N. J.); cf. *Chicago, St. P., M. & O. Ry. Co.* v. *United State* , 322 U. S. 1, 3–4; see also Berger, *Exhaustion of Administrative Remedies* (1939), 48 Y. L. J. 981.

[20] Appellants raised this point in the court below (R. 58, 98–99), even in their proposed findings of fact (R. 63) which the district court refused to adopt (see R. 65–73). The assignment of errors, *inter alia*, alleges that the district court erred in not adopting such findings of fact (R. 75).

65% of Globe's traffic" consisted of business handled for Universal Carloading & Distributing Company (R. 102; 38 M. C. C. at 384). Even if this statement in the acquisition case referred to the traffic handled by Globe on June 1, 1935, the "grandfather" date, rather than on a date almost seven years thereafter, it could not be relied on by appellee. The subsequent finding made by the full Commission in a proceeding directed specifically toward determination of the scope of Globe's rights under the "grandfather clause" would necessarily prevail over the earlier statement made by Division 4 in connection with a collateral proceeding dealing only with the propriety of approving appellee's acquisition of Globe's rights. Courts are not concerned with the correctness of the Commission's reasoning, or the consistency or inconsistency of its decision in a particular case with prior decisions which it has rendered. *Virginian Railway Co.* v. *United States,* 272 U. S. 658, 663; *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 271; *Georgia Public Service Commission* v. *United States,* 283 U. S. 765, 775; cf. *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602.

In the light of the Commission's finding of fact that during the "grandfather" period the only traffic transported by appellee's predecessor in interest was traffic moving on bills of lading of freight forwarders, it is obvious that a more extensive operating authority such as the district

court undertook to grant, not confined to transportation of commodities moving on bills of lading of freight forwarders, would not be compatible with the terms of the "grandfather" clause of the Act as repeatedly construed by this Court. The broad authority which the district court undertook to confer upon appellee would permit transportation by appellee of commodities generally, whether they were moving on bills of lading of freight forwarders or not. This would constitute a substantial change in the character of the operation, and would permit appellee to engage in different traffic transportation than that which its predecessor in interest handled during the "grandfather" period. Such an expansion or enlargement of the enterprise would be improper, and would permit appellee to occupy a much more advantageous position in the transportation industry than it would be entitled to on the basis of the operation as conducted during the "grandfather" period. *United States* v. *Maher*, 307 U. S. 148, 155; *Noble* v. *United States*, 319 U. S. 88, 92; *Crescent Express Lines* v. *United States*, 320 U. S. 401, 408–409. The "grandfather" clause granted to carriers entitled to its benefits only "substantial parity" between future operations and prior *bona fide* operations. *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 22; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 481; *Noble* v. *United States*, 319 U. S. 88, 92; *Crescent Express Lines* v. *United States*, 320 U. S.

401, 409. As the "grandfather" clause confers a special privilege, constituting an exception to a scheme of regulation required in the public interest and established by a remedial statute, this "grandfather" proviso determining exemptions from the necessity of proving public convenience and necessity is to be held to extend only to carriers plainly within its terms. *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage Company* v. *United States*, 316 U. S. 74, 83.

Besides the "grandfather" clause, further statutory authority supporting the limitation specified by the Commission is found in the provision of Section 208 (a) [21] of the Act making it the duty

[21] Section 208 (a) provides (49 U. S. C. 308 (a)):

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

of the Commission to "specify the service to be rendered" by the carrier receiving a certificate issued under the "grandfather" clause. That language justifies the Commission's action in confining appellee to transportation of the type of traffic handled during the "grandfather" period. In *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 483, it was recognized that under this provision the Commission may properly grant operating authority limited to carriage of particular commodities when it is clear that the applicant's holding out during the "grandfather" period was actually thus restricted. Moreover, in *Crescent Express Lines* v. *United States*, 320 U. S. 401, 408, it was held that under this Section the Commission could restrict a carrier to the type of vehicles used during the "grandfather" period. Likewise, in *Noble* v. *United States*, 319 U. S. 88, this Court sustained an order of the Commission restricting, under the closely comparable language of Section 209 (b),[22] a contract carrier's operating authority to the transportation of the enumerated commodities for the particular types of shippers served during the "grandfather" period.

In numerous instances of motor-carrier service rendered by railroads or railroad subsidiaries in connection with plans to provide coordinated rail-

[22] Section 209 (b) provides that "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof" (49 U. S. C. 309 (b)).

motor service, the Commission has granted operating authority containing, among other restrictions, a provision that the transportation performed shall be confined to commodities moving on railroad bills of lading. *E. g., Kansas City Southern Transport Co., Inc., Common Carrier Application,* 10 M. C. C. 221, 240; *Seaboard Air Line Railway Co. Motor Operation,* 17 M. C. C. 413, 433; *Chicago, Rock Island & Pacific Railway Co. Extensions,* 19 M. C. C. 702, 706–707; *Louisiana, Arkansas & Texas Railway Co., Common Carrier Application,* 22 M. C. C. 213. One such instance was considered in *Thomson* v. *United States,* 321 U. S. 19, and apparently received the tacit approval of the Court. The principal question considered in that case was whether the railroad or the truck operators actually performing the hauling should receive the operating authority, but no one asserted that the motor transportation authorized should not be limited to commodities moving on railroad bills of lading, as the Commission had done (31 M. C. C. 299, 306).

The district court refused to sustain the limitation primarily on the ground (Finding of Fact No. 10, R. 73) that the Commission's report contained no finding that the limitation was a reasonable one required by the public convenience and necessity. Perhaps such a finding might have been necessary if the Commission had been exercising its power under that portion of Sec-

tion 208 (a) which authorizes it to attach "to the exercise of the privileges granted by the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require," as when it requires an applicant to perform certain service in addition to that which it had performed during the "grandfather" period. Cf. *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1. Here, however, it is evident that the Commission was not exercising such power, but, as in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 483, and *Crescent Express Lines* v. *United States*, 320 U. S. 401, 408–409,[23] was only endeavoring to "specify the service to be rendered" (sec. 208 (a)) in order to bring substantial parity between the type of service authorized in the grant and that conducted during the "grandfather" period. (See R. 45.)

It is submitted that the Commission was correct in concluding that Globe, appellee's predecessor, was a common rather than a contract carrier and that the restriction imposed was not inconsistent with its common carrier status. The Commission recognized that for Globe to have been a common carrier under the Act it must have held itself out to transport for the general public.[24] The Com-

[23] Cf. *United States* v. *Maher*, 307 U. S. 148, 155; *Noble* v. *United States*, 319 U. S. 88, 91–92.

[24] Section 203 (a) (14) defines a "common carrier by motor vehicle" as "any person which holds itself out to the general public to engage in * * * transportation * * * (49 U. S. C. 303 (a) (14)).

mission found that the forwarder for which Globe transported dealt with the shipping public in general and did not limit its activities to selected shippers; that Globe transported the property of the shipping public in general which was assembled by the forwarder as the result of the latter's undertaking to have the same transported; and it concluded that Globe, through the freight forwarder as an intermediary, held itself out to the general public to engage in the transportation of property by motor vehicle (R. 42, 44; 42 M. C. C. at 548, 550). The fact that Globe restricted its undertaking to service furnished through freight forwarders was simply an indication that it wished to deal with the public in a particular manner and to restrict its transportation service to commodities moving on bills of lading of freight forwarders. Common carriers frequently limit their undertaking to particular commodities, or to traffic moving in certain quantities, or packed in a particular manner. Globe doubtless desired to engage only in transportation of traffic moving in truckload lots, and to accomplish this objective of eliminating less-than-truckload business it handled only traffic which had been assembled by freight forwarders. This restriction is analogous to a restriction limiting the service offered by a carrier to truckload shipments, or shipments of a certain minimum weight, or to commodities packed in a certain manner. None of these restrictions is inconsistent with the

common carrier status of the motor carrier. The statutory definition of "common carrier by motor vehicle" in Section 203 (a) (14) in fact specifically recognizes that a carrier may be engaged in the transportation of only a certain "class or classes" of property (see Appendix, *infra*, p. 55).

The Commission's decision is in accord with its consistent holdings in numerous other cases that persons hauling only for freight forwarders are, nevertheless, common carriers and not contract carriers. See, *e. g., American Motor Dispatch Inc., Common Carrier Application,* 26 M. C. C. 346; *Bleich Common Carrier Application,* 27 M. C. C. 9; *Hoey Cartage Co., Contract Carrier Application,* 28 M. C. C. 102. This rule developed because the Commission long recognized, as it did here (R. 43–44; 42 M. C. C. at 550), that freight forwarders occupy a different position from that of the ordinary shipper who tenders his own goods to a carrier for transportation. The forwarder merely tenders for transportation freight belonging not to itself but to the general public, which it has accepted and assembled as the result of an understanding with many shippers or consignees that it will undertake to have the property transported to its ultimate destination. By consolidating shipments for many shippers the freight forwarder is able to secure for such shippers the benefit of carload and truckload rates, which are generally lower than less-than-carload and less-than-truckload rates. The Commission

has held that freight forwarders are not common carriers by rail or motor vehicle nor express companies, but that they are nevertheless common carriers of another type at common law,[25] and in 1942, Part IV of the Interstate Commerce Act (56 Stat. 284, 49 U. S. C. Supp. III, 1001–1022) brought them within the regulatory jurisdiction of the Commission. The situation here is also analogous to that of the Union Stockyards in Chicago. In *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 220, this Court held that the appellant company was a common carrier by railroad insofar as it loaded and unloaded livestock at its stockyard, though it dealt directly only with other carriers, the railroads, and acted as their agents.

It is evident, therefore, that the Commission in concluding that Globe was a common carrier and that the restriction limiting appellee to the type of operation performed by Globe did not change its common carrier status, applied the correct rule of law, and that its conclusion is supported by a rational basis and substantial evidence. There was an expert administrative determination by the Commission, which, under the above circumstances, is binding upon this Court.

[25] See *Acme Fast Freight, Inc., Common Carrier Application*, 8 M. C. C. 211, 227–228, affirmed, *Acme Fast Freight* v. *United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed *per curiam*, 309 U. S. 638; *Freight Forwarding Investigation*, 229 I. C. C. 201, 303–4.

Rochester Telephone Corp. v. *United States,* 307 U. S. 125, 145–146; *Gray* v. *Powell,* 314 U. S. 402, 411–412; *Securities Commission* v. *Chenery Corp.,* 318 U. S. 80, 99; *Thomson* v. *United States,* 321 U. S. 19, 23; *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634, 637–638; see also Stern, *Review of Findings* (1944), 58 Harv. L. Rev. 70, 99.

III

THE DISTRICT COURT IMPROPERLY EXERCISED THE COMMISSION'S FUNCTIONS

Even if it were to be held that the appellee was not a common carrier, or that it would be inconsistent with appellee's common carrier status for the Commission to grant operating authority confined to transportation of commodities moving on bills of lading of freight forwarders, nevertheless the district court erred in enjoining (R. 73) that part of the Commission's order confining appellee's operations to transportation of such commodities. The district court thus undertook to permit appellee to exercise operating authority different from that granted by the Commission, and to engage in operations different from those which the Commission found Globe, appellee's predecessor, was performing during the "grandfather" period. In setting aside only the commodity restriction while leaving the order otherwise in effect, the district court undertook to exercise the administrative function

entrusted by Congress to the Commission of determining in the first instance the scope of the operating authority to be issued. The district court's action was contrary to the rule laid down in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 484, 489–90:

> It is not our function to weigh the evidence. Hence we intimate no opinion as to whether more commodities should have been included had the proper criterion been employed. * * *
>
> We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission.

If, as a matter of law, the Commission's order did not apply the proper statutory standards, the case should have been sent back to the Commission for an appropriate determination, in the light of applicable rules of law, of the transportation questions involved. *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 618–619, 622. Under the views which the Commission entertained as to its powers, it rendered an indivisible order. For the district court to permit appellee to transport commodities generally, without regard to whether they were moving on bills of lading of freight forwarders or not, would be to

transform completely the type of operating authority granted by the Commission, and "would make a basic alteration in the characteristics of the enterprise" of the carrier. *Noble* v. *United States*, 319 U. S. 88, 92. Such a modification in the nature and scope of the operating authority granted would be similar to the adoption of an entirely different plan for transportation operations, which the court correctly refused to do in *Chesapeake & Ohio Ry. Co.* v. *United States*, 35 F. (2d) 769, 774 (S. D. W. Va.), affirmed, 283 U. S. 35.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court should be reversed.

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APPENDIX

The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220–221 (substantially embodied in 28 U. S. C. 44, 47, 47a; *infra*, pp. 51–54) provides in part:

> The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear

and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, on whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference therto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken

within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State. * * *

Section 44 of Title 28, U. S. C. provides:

The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 47a, and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43, and 49 of Title 49, run, be served, and be returnable anywhere in the United States.

Section 47 of Title 28, U. S. C. provides:

> No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based

upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

Section 47a of Title 28, U. S. C. (Section 210 of the Judicial Code) provides:

A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the

notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court.

Section 345 of Title 28, U. S. C. (Section 238 of the Judicial Code) provides:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections, and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of sections 47 and 47a of this title as relate to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7. [Section 1 of the Act of February 13, 1925, 43 Stat. 936, 938.]

Part II of the Interstate Commerce Act, as amended.

Section 203 (a) (14) provides:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(49 U. S. C. 303 (a) (14).)

Section 206 (a) provides:

> Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 21, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so oper-

ated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935 under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained

such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part. (49 U. S. C. 306 (a).)

Section 208 (a) provides:

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require. (49 U. S. C. 308 (a).)

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